Office-Supreme Court, U.S.
FILED
MAY 27 1983
ALEXANDER L. STEVAS,
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82-1935

No.

IN THE

Supreme Court of the United States

October Term, 1982

DEMYAN'S HOFBRAU, INC.,

Petitioner,

vs.

INA UNDERWRITERS INSURANCE CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK A. WEG*
116 John Street
New York, N.Y. 10038
(212) 227-4210

BARRY D. LESSER
51 East 42nd Street
New York, NY 10017
(212)267-4230

*Counsel of record

QUESTIONS PRESENTED

1. Whether the finding of incendiarism by the District Court, made without benefit of a trial transcript, in conjunction with the Court's refusal to specify its reasoning for discounting impartial expert testimony which the Court, in its opinion, gave no comment whatsoever for ignoring or discrediting, constitutes reversible error in violation of Rule 52(a) of the Federal Rules of Civil Procedure thereby violating petitioner's rights of due process under the United States Constitution.

2. Whether the erroneous paraphrasing of critical expert testimony by the Court of Appeals for the Second Circuit constitutes reversible error in upholding the District Court's decision.

3. Whether the District Court's determination of the incendiary, non-accidental character of the fire in question constitutes a violation of petitioner's rights of due process under the United States Constitution, as said decision necessarily exposes petitioner to potential criminal prosecution for arson and limits petitioner's ability for future economic gain, having been found an arsonist.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No.

DEMYAN'S HOFBRAU, INC.,
Petitioners,

vs.

INA UNDERWRITERS INSURANCE CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The law firm of Weg, Myers & Jacobson, P.C., on behalf of Demyan's Hofbrau, Inc.,* petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Memorandum Decision, Findings of Fact and Conclusions of Law, and the Judgment of the United States District Court for the Southern District of New York, all dated July 15, 1982 are reported at 542 F.Supp. 1385 and are printed as Appendix C herein. The Decision of the United States Court of Appeals for the Second Circuit from which certiorari is sought dated January 6, 1983 affirming the decision of the

*Demyan's Hofbrau, Inc. is a closely held New York corporation with no parent companies, subsidiaries or affiliates and owned by John Demyan.

District Court, is not reported and appears as Appendix B herein. The order of the Second Circuit denying the petition for rehearing and the Suggestion for Rehearing en Banc, dated March 1, 1983, is not reported but is printed as Appendix A herein.

JURISDICTION

The Court of Appeals decision in these cases was rendered on January 6, 1983 (App. B). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on or about January 20, 1983 and denied on March 1, 1983 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

2. Rule 52(a) of the Federal Rules of Civil Procedure provides in relevant part:

> "In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, . . ."

STATEMENT OF THE CASE

Demyan's Hofbrau, Inc. a New York corporation,

began operations in 1959 as a restaurant and catering business at 730 Van Duzer Street, Staten Island, New York. The restaurant was started by John P. Demyan and his brother, Francis Demyan, who each had fifty percent (50%) ownership in the business.

On July 18, 1979 INA Underwriters Insurance Company (hereinafter "INA") issued to Demyan's fire insurance policy number RMPD0218364A insuring Demyan's for a period of one year against loss by fire and its effects. The INA policy was subject to a limit of liability of three hundred thousand dollars ($300,000.00) applicable to the building on the premises, and one hundred fifty thousand dollars ($150,000.00) applicable to the contents within the building.

Shortly before 5:00 a.m. on January 8, 1980 the building and personal property within suffered major damage from a three-alarm fire which required 11 hours of firefighting activity before it was extinguished.

Subsequent to the fire INA made demands pursuant to the statutory terms of the policy including the submission of sworn proofs of loss and examination under oath which were complied with by John and Patricia Demyan.

Thereafter, INA denied liability on Demyan's claim and on February 18, 1981 Demyan's instituted suit against INA in Supreme Court of New York for Richmond County to recover the proceeds under the policy.

Demyan's action commenced against INA in New York Supreme Court for Richmond County was removed by INA from that Court to the United States District Court for the Eastern District of New York on March 16, 1981. On March 18, 1981 INA answered Demyan's complaint denying liability based on the affirmative defenses of arson and fraud and false swearing.

By stipulation of the parties and Order of the Court (Judge Milton Pollack) the action in the Eastern District of New York was discontinued and removed to the District Court for the Southern District of New York. Also pursuant to that Order and Stipulation, the plaintiff INA and defendant (Demyan's) were reversed, and the Amended Answer of Demyan's was made the Complaint and the reply to Demyan's counterclaims by INA was deemed as the Answer.

This case was tried without a jury before Federal District Judge Milton Pollack on May 24, 25 and 26 and June 2, 1982.

During the trial, evidence was received on all contested issues including Demyan's claim of liability and damages, INA's affirmative defenses, and plaintiff's rebuttal evidence to those defenses.

Immediately upon the conclusion of the trial on June 2, 1982 and without the benefit of a trial transcript, Judge Pollack from the bench and on the record entered an interim decision and held as a finding of fact that the fire that occurred at Demyan's Hofbrau on January 8, 1982 was of non-accidental, incendiary origin (App. C).

That interim decision was later incorporated by the Court into its final decision of July 15, 1982 and states as follows:

> "It has been clearly proved by the defendant and not contradicted by any acceptable evidence worthy of belief, that the fire on January 8, 1980 was of incendiary, non-accidental origin. There were two and perhaps three points of origin of fire, separate and separated, which were caused in each location by a supplied flammable liquid or accelerant to the premises. There was no evidence which is credited by the court of any other cause for the outbreak of the fires. The location of the points of origin and the inverted cones and the pooling make it clear and convincing beyond peradventure of doubt that arson was the cause at each of the two or perhaps three separate and separated portions of the insured premises. (App. C)"

On July 15, 1982 Judge Pollack rendered a decision and Findings of Fact. In that decision the Court incorporated its prior interim decision and finding that the fire at Demyan's was incendiary in origin. In its final decision the Court went on to find by circumstantial evidence that INA was not liable under the policy by reason of arson.

This decision was appealed to the Court of Appeals for the Second Circuit, which affirmed the Decision of the District Court on January 6, 1983 (App. B). Petition for Rehearing and the suggestion for Rehearing En Banc was denied by the Second Circuit on March 1, 1983.

Plaintiff-appellant's appeal to this court concerns only the Trial Court's finding of fact and the appellate court's affirmance thereof, incorporated into the final

decision, that the fire of January 8, 1982 was incendiary in origin and intentionally set, which finding was a prerequisite to the Trial Court's ultimate finding of arson in this case. If the fire was not incendiary it is axiomatic that the Insurance Company's defense of arson must fail.

ARGUMENT

Rule 52(a) of the Federal Rules of Civil Procedure outlines the requirements regarding findings of fact and conclusions of law in actions tried without a jury. Specifically, Rule 52(a) provides that in non-jury actions ". . . the Court shall find the facts specially . . ." Fed. R. Civ. P. 52(a). While it is true that extensive discretion must necessarily be imparted to the trial judge, findings of fact can and should be set aside where, as here, such findings are clearly erroneous.

Ordinarily, an appellate court must abide by a lower court's factual determinations and presume such findings correct. *United States of America v. United States Gypsum Company et al.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948). This is *not* the case where such determinations lack evidentiary support or are against the weight of the credible evidence, *Gypsum, supra*, and the following arguments will demonstrate such is the situation in the case subjudice.

A. The Interim Findings and Ultimate Decision Of The District Court Violate FRCP 52(a) and Petitioner's Rights Of Procedural Due Process Under the United States Constitution.

In the instant case, tried without a jury, the trial

court made interim findings of fact, without reference to the trial transcript, regarding the incendiary nature of the fire. In these findings the Court stated that the defendant had demonstrated that the fire in question was of an incendiary, non-accidental origin and that such origin was ". . . not contradicted by any evidence worthy of belief. . . ." (App. C) Yet the testimony of Battalion Chief Francis T. Gallagher, the commander of the fire company which responded to the alarm, an impartial eyewitness and highly experienced expert, unequivocally refuted these interim findings in his testimony.

Chief Gallagher was subpoenaed by plaintiff and testified as to his knowledge of the events surrounding the fire in question. Despite the introduction into evidence of the Battalion Chief's official fire report which he signed, he testified from his independent memory of the events. His testimony was in all ways consistent with his aforementioned signed official report.

Too much emphasis or significance cannot be given to the testimony of this witness. It was readily apparent that the witness did not favor either side of the litigation. His testimony was forthright and unequivocal. He did not vacillate and was responsive to both counsel on direct and cross-examination, having a clear recollection of the events which were the subject of his testimony. His background included 32 years in the fire department.

The District Court in its interim findings and in its ultimate decision does not specify or make any comment whatsoever as to why the testimony of this crucial witness was totally disregarded.

Further, to make its determination, the Court must not only have ignored the testimony of this eyewitness with knowledge of the fire as it actually existed, but must necessarily have relied upon the testimony of witnesses who merely examined a 'cold' or extinguished fire one day thereafter. Such witnesses did not even benefit from the results of scientific determinations as none were conducted by these experts.

As the finding is therefore not supported by the weight of the evidence, said finding comports with the long standing criteria for reversal of such findings under the "clearly erroneous" doctrine of Rule 52(a) of FRCP. *Gypsum, supra.*

To arrive at the conclusion that the fire was incendiary and non-accidental in origin, the District Court was compelled to rely upon the demeanor of Respondent's witnesses at trial. Clearly, this is permissible within the parameters of Rule 52(a). *Gypsum, supra.* Yet, here the Court's findings were based on the in-court testimony of only one witness, a fire marshall who was not an eyewitness to the fire, but examined the scene one day thereafter. Testimony supportive of this sole in-court witness for the defendant was augmented by testimony of another fire marshall deposed prior to trial, and excerpts of said prior deposition were included in the record. Obviously, the non-appearance of this witness at the trial of the action did not permit the Trial Court to make any observation as to the witness' demeanor or credibility. This therefore mandates a reverse application of the above stated rule, to wit: testimony of witnesses who did not appear before the trial court is *not* unassailable. In point of fact, the "clearly erroneous" standard is

lessened where depositions are reviewed and employed at the trial court level. *Emmco Ins. Co. v. Wallenius Carribean Line S.A.*, 492 F2d 508, (1974.) This further exemplifies the inadequacy of the Trial Court's Decision as regards its failure to evaluate adequately the testimony of the witnesses. Furthermore, the non-testimonial evidence of the Chief's fire report, exactly corresponding with the Chief's testimony, could be reviewed by the appellate court and this court on the same evidentiary basis as the Trial Court. While it is true that findings of the District Court need not include detailed statements of the effect of the testimony of conflicting witnesses, it is likewise true that in such situations the findings will stand only if there is substantial evidence to support it. *Ruby v. American Airlines Inc.*, 329 F.2d 11, 1964.

Through this neglect of weighty, pivotal testimony and the accompanying refusal to address with specificity its reasoning for such neglect, the District Court impermissibly denied petitioner due process under the Constitution by failing to comply with Rule 52(a) of the Fed. R. Civ. P. For in the case at bar petitioner has been judicially found to be an arsonist but without knowing the reasons therefor. This violation of petitioner's constitutional rights of procedural due process is the very thing Rule 52(a) was designed to prevent as a check upon the extensive power of a District Court Judge sitting as the trier of fact.

B. The Erroneous Paraphrasing of Testimony by the Court of Appeals for the Second Circuit.

The verbatim testimony of Chief Francis Gallagher clearly and unequivocally demonstrates

that the Judgment of the District Court was erroneous and such testimony was paraphrased in error by the Court of Appeals for the Second Circuit in an Order dated January 6, 1983.

Petitioner disputes the accuracy of the paraphrased testimony of Chief Gallagher set out in said Order and upon which testimony the Court's Order hinged, to wit:

> "In response to plaintiff's questions, Gallagher testified that he would have observed any lower level fires that had been started by 'accelerant', that he did not observe any lower level fires, and that the fire originated in an air space below the ceiling. In response to defendant's questions Gallagher testified that visibility within the building was 'almost zero', that lower level fires close to the entrance from which Gallagher made his observations would have been extinguished before he entered the restaurant, and that when he made his observations he was primarily concerned with tasks more urgent than establishing the origin of the fire." (App. B)

Petitioner contends that the verbatim testimony of Chief Gallagher is contrary to the Circuit Court's paraphrasing of his testimony, specifically that

> "Gallagher testified that the visibility within the building was 'almost zero', that lower level fires close to the entrance from which Gallagher made his observations would have been extinguished before he entered the restaurant. . . ." (App. B)

The verbatim and unequivocal testimony of the Fire Chief is contrary to the Court's paraphrasing of his testimony that "the visibility *within the building* was almost zero." The complete testimony on this

point is as follows:

Petitioner's Direct Examination:

Q. Now, Chief, I ask you to recall as carefully as you can, as you entered the building some five minutes after arrival when part of your men were engaged in their various firefighting attempts and *you climbed a flight of steps inside the building,* which put you on whatever level it is, did you see any fire below and in back of you? (Emphasis added)

A. No, I didn't.

Q. Was there any heavy smoke coming from below and in back of you?

A. That's hard to tell where the smoke was coming from. It was very heavy, the visibility was almost zero.

Q. I'm referring, when I ask you that question, to the area immediately adjacent to the right of the entrance that you entered, an area that's been described during the course of this trial as exposure two.

A. It was smoky but it wasn't what they call pushing. There was no pressure behind it.

Q. If you had to classify the smoke and there are three classifications in the fire department, are there not, light, medium and heavy, is that correct?

A. That's correct.

Q. Could you tell us whether the smoke that was coming from there fell within one of those classifications?

A. It was a heavy smoke condition.

Q. And how about up above?

A. It was very heavy upstairs on the floor they were working on. They only got in on the floor maybe ten foot where they were working on the ceiling and that was it.

Q. Would you say that the smoke upstairs, and I notice you said it was very heavy, was it heavier than the smoke downstairs?

A. Yes, it was.

Q. Decidedly so?

A. Yes. Very heavy.

First, it is clear from the above transcript testimony of the Chief that when the Chief testified "the visibility was almost zero", this was *not* an observation made by the Chief from the entrance but *inside and atop an interior flight of stairs where the fire company was fighting the fire.*

It is therefore clear that the Court's opinion is in error where it states "... the entrance from which Gallagher made his observations".

It is unquestionable that when the Chief testified visibility was "almost zero" he was testifying as to the visibility at the top of the stairs from where he made this observation, *not* the entrance, and this verbatim testimony was in response to the question:

Q. [from the vantage point at the top of the interior stairs] ... did you see any fire *below and in back of you?*

A. No. I didn't.

Q. Was there any smoke coming from *below and in back of you?*

A. That's hard to tell where the smoke was coming from. It was very heavy, the visibility was almost zero. [from the Chief's point of observation which was then atop the interior stairs where the fire was being fought and not the entrance]

The Court of Appeals omitted further testimony of Chief Gallagher which clearly differentiated his ability to observe and the visibility at *each* of the *two* observation points, the entrance and atop the interior stairs.

> Q. Would you say that the smoke upstairs and I notice you said it was very heavy, was it heavier than the smoke downstairs [at the entrance]?
>
> A. Yes, it was.
>
> Q. Definitely so?
>
> A. Yes. Very heavy.

It is clear that contrary to the Court's paraphrasing of the Chief's crucial testimony in its opinion, the word-for-word testimony clearly establishes: (1) the Chief did not make all his observations solely from just the entrance near the place where defendant alleges the fire to have originated, but from two points, the entrance and atop the inside stairs where the firefighting was going on, and (2) when the Chief testified visibility was "almost zero" he did not testify that was the condition "within the building", as the Court paraphrased, but on the contrary, was solely the visibility described by the Chief from his observation point *not at the entrance, but* atop the interior stairs where the firefighting was then taking place.

Any scintilla of doubt as to the points of the Chief's observations and as to the visibility and smoke conditions at those points vanishes upon reading the above-quoted testimony of the Chief wherein he clearly differentiates the smoke conditions and visibility at the entrance, versus the smoke and visibility when he was atop the interior stairs:

Q. Would you say the smoke upstairs, was it heavier than the smoke downstairs?

A. Yes, it was.

Q. Decidedly so.

A. Yes. Very heavy.

Thus it was *not* the Chief's testimony that visibility "*in the building* was almost zero" (emphasis added) but that visibility was "almost zero" *atop the interior stairs where the Chief made this observation.* Visibility was *not* "almost zero" at the entrance which was not the Chief's only point of observation, and was not the point of observation where the Chief testified he observed visibility "almost zero".

Petitioner further contends the Court made additional error in paraphrasing the testimony of Chief Gallagher, to wit:

> "that lower level fires . . . would have been extinguished before he entered the restaurant . . ."

The above-paraphrased testimony of the Chief appears verbatim in the record on the Chief's cross-examination as follows:

> Q. If there was a fire burning right there [adjacent to the entrance] . . .
>
> Q. If there was a fire in that little room where that door was that he forced and where the windows were, would normal operating procedures of that engine company be to knock down and put out those flames, first?
>
> A. Yes. He would never—
>
> MR. WEG: Excuse me. I don't object to the

hypothesis but it suggests a conclusion that's contrary to this witness' testimony.

THE COURT: He's asking a hypothetical question as to what the duties would be if they saw flames on arrival at that location.

MR. WEG: I don't understand that to be his question.

THE COURT: That's what I understood the question. Didn't you understand that's what he was talking about?

THE WITNESS: Yes, sir.

Q. They knocked the flames down that they saw right there, if they saw them, right?

A. Yes.

Q. They would put out the flames to the extent they could with their hose lines in that little enclosed room right there, is that right?

A. That's correct.

Petitioner now contends, as properly asserted at trial in its objection to the above hypothetical question posed to the Chief, that the Chief was testifying to a *hypothetical question*, the bases for which were facts not in evidence and contrary to the Chief's own testimony that:

"[Fire] was at no place at all in the interior."

Furthermore, the Chief made the above observation at the entrance of the building and *not* atop the inside stairs where visibility was "almost zero" and where the smoke was "decidedly heavier" than at the entrance.

Even conceding, arguendo, the propriety of the

said hypothetical question, any possibility that there was already a fire fueled by accelerant at the entrance, but extinguished before the Chief got there, is totally foreclosed by the Chief's verbatim testimony on redirect examination which the Court of Appeals omitted from its opinion, as follows:

MR. WEG:
Q. Take on the hypothesis that Mr. Young just gave you assuming that a fire originated at the entrance on the right—

THE COURT: He didn't say originated. He said existed. He didn't say originated.

Q. A fire was burning—

THE COURT: That's better.

Q. —at the point we have just described, would you say—withdrawn.

Did you see any evidence of anybody having fought such a fire on your way up there?

A. *No. I didn't see any fire at all there.*

Q. And on your way up there, would you have seen evidence of such a fire having been fought either by water or hoses or personnel?

MR. YOUNG: Objection.

THE COURT: Overruled.

A. *Yes, I probably would have.*

Q. And particularly so if this burning were accelerated by use of an accelerant?

MR. YOUNG: Objection.

THE COURT: Overruled.

A. Yes.

Q. *Yes, you would have seen it?*

A. *I would have seen it, yes.* (Emphasis added)

As stated, the Chief's testimony was that visibility *atop the interior stairs* (*not* at the level of the entrance) "was almost zero" with smoke conditions "decidedly heavier" than at the entrance. It was at this entrance that the Chief testified:

> "*No. I didn't see any fire at all there.*" (Emphasis added)

And the Chief testified if a fire had been fought at the entrance he "probably would have" seen "evidence of such a fire having been fought and such a fire was fueled with accelerants".

The Chief stated he "would have seen" the fire or evidence of one having being fought.

This crucial re-direct testimony of the Chief was completely ignored by the Circuit Court in its Opinion!

Therefore, the word-for-word testimony of Chief Gallagher, which is the most crucial in this case as he was the sole eyewitness expert to testify, clearly demonstrates that the Court of Appeals for the Second Circuit, in hinging its opinion on the Chief's testimony, incorrectly paraphrased the testimony.

Therefore, based on the foregoing, the Court of Appeal's erroneous paraphrasing of critical testimony constitutes reversible error upon which the Order denying rehearing dated March 1, 1983 should be reversed.

C. Potential Criminal Prosecution

There is an overriding constitutional issue of first impression which must be a subject of consideration by this Court.

Assuming, arguendo, that the Trial Court erred in its finding of fact as to incendiarism, then and in that event such hypothetical error necessarily permitted the conclusion that the plaintiff or his agents had committed an act of arson. Stated from another perspective, in the absence of a finding of incendiarism there could not have been a finding of arson.

Accordingly, on the basis of the decision of the Trial Court, as sustained by the Circuit Court, the plaintiff-appellant policyholder remains exposed to prosecution by criminal authorities for the crime of arson. On the same assumption for the sake of argument that error was committed by the Trial Court with a resultant factual determination that the plaintiff had not committed civil arson, then and in that event this plaintiff would be free from any exposure to criminal prosecution by the appropriate authorities under the doctrine of collateral estoppal, i.e., innocence presumed on the basis of a lesser burden than that which would have been necessary by a finder of the facts in a criminal proceeding.

In fact, on information and belief, this fire and its origin remain an open subject of investigation in the office of the Richmond County District Attorney. The serious overtones stated hereinabove, it is respectfully submitted, require the closest scrutiny and reexamination of the pattern of facts which led to the Court's conclusion of incendiarism.

Additionally, and notwithstanding the serious exposure to potential criminal prosecution, a serious economic impact of a negative nature must necessarily be felt by the petitioner as a result of the implications and aspersions extant within the business and social community in which this matter took place. Such ramifications will necessarily severely impact the appellant from future economic attainments and accordingly constitute a potential deprivation of his rights under the due process of the United States Constitution.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant certiorari to consider the important constitutional and procedural questions presented.

Respectfully submitted,

FRANK A. WEG
Attorney for Petitioner

APPENDIX A—Court of Appeals Decision Denying Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the first day of March, one thousand nine hundred and eighty-three.

DEMYAN'S HOFBRAU, INC.,
Plaintiff-Appellant,

v.

INA UNDERWRITERS INSURANCE CO.,
Defendants-Appellees.

No. 82-7614

UNITED STATES COURT OF APPEALS
FILED
MAR 1 1983
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Demyan's Hofbrau, Inc.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
s/ Francis X. Gindhart
by Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX B—Court of Appeals Decision Affirming District Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of January, one thousand nine hundred and eighty-three.

Present: HONORABLE WILLIAM H. TIMBERS
HONORABLE JON O. NEWMAN,
HONORABLE LAWRENCE W. PIERCE,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
JAN 6 1983
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

DEMYAN'S HOFBRAU, INC.,
Plaintiff-Appellant.

v.

INA UNDERWRITERS INSURANCE CO.,
Defendant-Appellee.

82-7614

ORDER

Plaintiff Demyan's Hofbrau, Inc. appeals from a July 15, 1982, judgment of the United States District Court for the Southern District of New York (Milton

Pollack, Judge) dismissing, after a non-jury trial, plaintiff's claim for proceeds allegedly owed under an insurance policy written by defendant INA Underwriters Insurance Company. INA insured a restaurant owned by plaintiff. On January 8, 1980, one day prior to the expiration of plaintiff's insurance policy, plaintiff's restaurant was substantially damaged by fire. The District Court's decision to release INA from any obligation to compensate plaintiff for the damage resulting from the fire was based on its finding that the fire was intentionally set by plaintiff. Plaintiff now contends that the District Court's finding of arson was clearly erroneous. Because out examination of the record indicates otherwise, we affirm the judgment.

According to the testimony of two fire marshals, an examination of the restaurant after the fire was extinguished revealed substantial traces of flammable liquid, or fire "accelerant," in three locations on the first floor. In each of these locations, the fire marshals discovered an "inverted cone" showing the upward and outward spread of the fire, and a "burn pattern" of severe charring close to the floor level. If credited, this testimony provides adequate support for the District Court's finding that the fire was intentionally set on the first floor of the restaurant.

Plaintiff argues that the testimony of Battalion Chief Gallagher required the District Court to reject the testimony of the fire marshals, and to find that the fire originated in an area near the roof of the restaurant, where no traces of arson were exhibited. Gallagher entered the building through a utility room door, a few minutes after several firemen had already forced their way in. In response to plaintiff's ques-

tions, Gallagher testified that he would have observed any lower level fires that had been started by "accelerant," that he did not observe any lower level fires, and that the fire originated in an airspace below the ceiling. In response to defendant's questions, Gallagher testified that visibility within the building was "almost zero," that lower level fires close to the entrance from which Gallagher made his observations would have been extinguished before he entered the restaurant, and that when he made his observations he was primarily concerned with tasks more urgent than establishing the origin of the fire.

Gallagher's responses to defendant's questions substantially diminished the probative force of those portions of his testimony that are emphasized by plaintiff. Thus weakened, those portions of testimony are insufficient to require discrediting the fire marshals' testimony as a matter of law. The District Court's finding of arson was not clearly erroneous.

Having found that the fire resulted from arson, the District Court went on to make the additional and distinct finding attributing responsibility to plaintiff. The record provides adequate support for this second finding, the propriety of which is not contested on this appeal.

The judgment of the District Court is affirmed.

s/ Wm. H. Timbers

s/ Jon O. Newman

s/ Lawrence W. Pierce

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX C—District Court Decision

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEMYAN'S HOFBRAU, INC.,
Plaintiff,

v.

INA UNDERWRITERS INSURANCE CO.,
Defendant.

DECISION
FINDINGS AND OPINION

APPEARANCES:

WEG MYERS & JACOBSON, P.C.
Attorneys for Plaintiff
116 John Street
New York, N.Y. 10038
By: Frank A. Weg, Esq.
Robert A. Lubitz, Esq.

WHITMAN & RANSOM
Attorneys for Defendant
522 Fifth Avenue
New York, N.Y. 10036
By: John C. Young, Esq.

MILTON POLLACK, U.S. District Judge.

Milton Pollack, District Judge.

In the early morning of January 8, 1980, a three-alarm fire partially damaged the four story, 100 year-old building which, for more than 20 years, had housed Demyan's Hofbrau, a public restaurant, catering establishment and bar in Staten Island. Previously, the premises were used as a brewery. After the fire, plaintiff demolished the Hofbrau building and discontinued in the restaurant business.

Plaintiff Demyan's Hofbrau, Inc., which operated the Hofbrau, is a New York corporation and was owned in equal parts by two brothers, John and Frank Demyan. (The latter died in October 1978 leaving an estate.) The Demyan's real estate holdings which consisted of the Hofbrau building and seven other rental commercial and residential properties adjacent to the Hofbrau were deposited in a second corporation, Demyan's Realty, Inc., also half-owned by each brother.

On February 18, 1981, plaintiff filed this diversity suit to collect the fire insurance policy limits of $300,000, for damage to the building and of $150,000, for damage to its contents, from defendant, INA underwriters Insurance Co. ("INA"). INA thereupon raised the defenses of arson and plaintiff's implication therein and false swearing by the assured in submitting its proof of claim thereby voiding the insurance.

This case was heard at a Bench trial by the Court without a jury. At the close of trial, the Court made interim findings of fact regarding the incendiary, non-accidental character of the fire and the partial nature of the damage to the building. The Court found:

> It has been clearly proved by the defendant and not contradicted by any acceptable evidence worthy of

belief, that the fire on January 8, 1980 was of incendiary, non-accidental origin. There were two and perhaps three points of origin of fire, separate and separated, which were caused in each location by a supplied flammable liquid or accelerant to the premises. There was no evidence which is credited by the court of any other cause for the outbreak of the fires. The location of the points of origin and the inverted cones and the pooling make it clear and convincing beyond peradventure of doubt that arson was the cause at each of the two or perhaps three separate and separated portions of the insured premises.

Furthermore, it is unquestionable that the premises were not a total loss, and that the destruction by fire was partial only.

The Court then requested post-trial briefs on several remaining issues to be decided, viz.: 1) the complicity, if any, of the insured with the arson; 2) whether there was clear and convicing evidence that intentionally false statements regarding proof of loss were made; and 3) assuming that the Court might reach this question, what damages were compensible and under what terms of the policy.

After consideration of the briefs as well as all the testimony and exhibits that were submitted, and on due deliberation, the Court concludes that plaintiff is barred from any recovery on the policy, since on the preponderance of the evidence the Court finds that the assured was implicated in causing the fire which damaged the Hofbrau. In view of these dispositions of the arson issues, the other defense of deliberate false swearing in the proof of claim and the objections to plaintiff's damage proof need not be considered.

The burden of proof

In New York, the burden is on the insurer to prove the defense of arson and the assured's implication therein, by a fair preponderance of the credible evidence. *Johnson v. Agricultural Ins. Co.*, 25 Hun 251 (4th Dep't 1881).[1] In this regard, since "[d]irect proof

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1. In a footnote set out in *C-Suzanne Beauty Salon, Ltd. v. General Ins. Co. of Am.*, 574 F.2d 106, 112 n.9 (2d Cir. 1978), it was suggested that "clear and convincing evidence" is required in New York to establish the defense of arson—the same standard as in fraud cases.

The reference in the footnote when read in its context clearly relates to the proof of loss, not to the question of arson of the assured alone, since the law in New York is clear, as stated in the *Johnson* case cited in the text above. Indeed, the great weight of authority in other states establishes that the arson origin of a fire attributable to the assured may be established by a preponderance as distinct from the fraud standard of evidence. *See, e.g., Vicksburg Furniture Mfg., Ltd. v. Aetna Casualty & Surety Co.*, 625 F.2d 1167, 1169 (5th Cir. 1980) (Miss. law); *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 349 (7th Cir.), *cert. denied*, 421 U.S. 1011 (1975) (Ill. law); *Connecticut Fire Ins. Co. v. Fox*, 361 F.2d 1, 6 (10th Cir. 1966) (Wyo. law); *J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 501 F. Supp. 942, 960 (M.D. Fla. 1980) *rev'd on other grounds*, 677 F.2d 1365 (11th Cir. 1982); *Godwin v. Farmers Ins. Co. of Am.*, 129 Ariz. App. 416, 631 P.2d 571, 573-74 (1981); *MFA Mutual Ins. Co. v. Pearrow*, 245 Ark. 795, 434 S.W. 2d 269, 272-73 (1968); *Klayman v. Aetna Casualty & Surety Co.*, 501 P.2d 750, 752 (Colo. App. 1972); *Werner's Furniture, Inc. v. Commercial Union Ins. Co.*, 39 Ill. App. 3d 59, 349 N.E. 2d 616, 620-21 (1976); *Osvaldo Varane, Inc. v. Liberty Mutual Ins. Co.*, 362 Mass. 864, 284 N.E.2d 923, 924 (1972); *George v. Travelers Indemnity Co.*, 81 Mich. App. 106, 265 N.W.2d 59, 62 (1978); *Quast v. Prudential Property & Casualty Co.*, 267 N.W.2d 493, 495 (Minn. 1978); *Pacific Ins. Co. of N.Y. v. Frank*, 452 P.2d 794, 706 (Okl. 1969); *Greenberg v. Aetna Ins. Co.*, 427 Pa. 494, 235 A.2d 582, 583-84 (1967); *Raphtis v. St. Paul Fire & Marine Ins. Co.*, 86 S.D. 491, 198 N.W.2d 505, 507 (1972); *Great American*

of arson is seldom available," it is well settled that arson may be established by circumstantial evidence. *Elgi Holding, Inc. v. Insurance Co. of North America*, 511 F.2d 957, 959 (2d Cir. 1974); *Shawanga Holding Corp. v. New York Property Ins. Underwriting Ass'n*, 57 A.D.2d 677, 394, N.Y.S. 2d 69, 70 (3d Dep't 1977).

Opportunity to Fire the Building

In his testimony, John Demyan named only four persons who had keys and access to the Hofbrau premises: John Demyan, his sister-in-law, Patricia Demyan, his son, John Demyan, Jr. and a bartender (unnamed in Demyan's testimony). The day after the fire John Demyan told the Fire Marshall that his niece, Denise Demyan, and his cook, Steve Jacobson, also had keys to the Hofbrau. In his statement he named the bartender who held the key as David DiCarlo. None of those three were witnesses at the trial. Demyan, in his testimony, did not mention Harold Coyle, the other bartender.

Harold Coyle was called as a witness for the plaintiff at the trial. He also tended bar and did catering jobs. He testified that it was he who went around the building at closing time on the early morning of the 8th January 1980 and he checked all the doors to the premises, turned off the lights, inside and in the parking lot, cleaned up the bar and swept up and about 3 A.M. he left with David DiCarlo, the other bartender,

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Ins. Co. v. K & W Log, Inc., 22 Wash. App. 468, 591 P.2d 457, 459-60 (1979); 22A J. Appleman, *Insurance Law and Practice* §13876 (1979); 19 *Couch on Insurance* §79:473 (2d ed. 1968). *But see Carpenter v. Union Ins. Soc. of Canton, Ltd.*, 284 F.2d 155, 162 (4th Cir. 1960); *Jonas v. Northeastern Mutual Fire Ins. Co.*, 44 Wis. 2d 347, 171 N.W.2d 185, 187 n.1 (1969).

through the bar-room front door which they locked from the outside. They set the switch to the burglar alarm located on the outside of the door jamb. The first of the firemen who arrived on the scene testified that the front door was locked when he got there.

Coyle testified that when he left everything was in order in the premises, they were locked tight, there was no sign of fire anywhere. The only persons who had access to the premises were the Demyans and the employees named. John Demyan testified that he had taken the precaution to change the locks in the building twice a year since each bartender who closed up for him was issued a key. Coyle had been employed for about three years and DiCarlo had been an employee for a period of nine years.

John Demyan testified that at about five o'clock in the morning on January 8, 1980 he received a call from police who informed him of a fire at the Hofbrau. He dressed and rushed down to the restaurant, arriving at about a quarter after five. He testified that when he arrived he heard the burglar alarm ringing and "immediately ran to the front door", "the key to the alarm is on the outside, I wanted to turn it off" "I just went up to the door to turn the alarm off". He did not know why he wanted to shut the alarm off; that was just the way he reacted.

No one else who was at the scene at the time mentioned anything about hearing an alarm sounding or corraborated Demyan's testimony of an alarm sounding. The front door was still locked, unforced, when Demyan says he arrived there. The firemen made no mention in their testimony or in their departmental reports of hearing a burglar alarm sounding. Seeming-

ly, an activated alarm would imply that someone without a key or without knowledge of how to quiet the alarm system had gained access to the premises during the night.

John Demyan's mention of a burglar alarm turned vague and contradictory as his testimony progressed. In direct examination he stated that the alarm had been activated before he got there and that he had been able to turn off the alarm. On cross-examination he ventured that perhaps the firemen had activated the alarm when they forced the doors. On re-direct examination, however, he admitted that he had not shut off any alarm, that the alarm noise had continued on albeit he had gone to the front door (where the burglar alarm switch was located) to shut the noise off as soon as he had arrived at the scene. On further questioning Demyan fell back on the statement that he could not tell if the sound he had heard was from the burglar alarm or rather was from the fire bell which was activated by and connected to the sprinkler system.

The burglar alarm at the Hofbrau was an automatic dialer, which was set up to call Patricia Demyan, as well as the police, in the event of a break-in. Though she testified that she was at home the night of the fire, she did not receive a call from the automatic dialer. No one testified that the police had or had not received a call from the automatic dialer at any time, either before or after the firemen arrived.

The fireman who arrived with the first due company and whose job it was to force open the doors testified that all those he tried were locked. There were no signs of forced or unauthorized entry into the Hofbrau building during the night or the morning of the fire.

The exclusive opportunity to enter the Hofbrau building was with those who had access thereto with the keys; others lacked this opportunity and would have had to make a forcible entry to get in. No admissions or evidence placed any of the holders of the keys at the Hofbrau after it had been closed up for the night. John Demyan claimed that he had left the premises at about 11 P.M. on the 7th day of January while Patricia Demyan testified that she was at home that night. Coyle and DiCarlo closed up at about 3 A.M. The others named as key holders did not testify.

Motive

The evidence shows that Demyan's Hofbrau, Inc. had steadily been losing ground in the two or three years before the fire; its custom and earnings were diminishing and it conceivably was reaching the point where the business was no longer profitable enough to be continued. It had been experiencing financial stringency for quite some time. John's brother, Frank, died unexpectedly in October 1978, raising the problem of settling with his estate for Frank's half-interest in Demyan's Hofbrau and Demyan's Realty, for which there was no money to pay. The 100 year old building was assessed in 1979 for only $32,500 by the City (admittedly considerably below the theoretical market value, although no bidder for the premises was obtained in 1978-79 when the premises were listed for sale). In a statement to a Fire Marshal after the blaze, John Demyan had stated that the pre-fire value of the contents of the building was $100,000.

There is no evidence that any other person had any motive to set the Hofbrau on fire. John Demyan testified that he had no problems with his employees,

tenants or neighbors. He told fire investigators after the fire that he had no reason to believe anybody would set a fire in the Hofbrau.

John Demyan steadfastly denied that either he or anyone connected with the owners shared any complicity in the firing of the premises. He maintained at trial that the Hofbrau's business had remained relatively constant over the years; however, the evidence to the contrary shows that there was a substantial decline in the earnings, cash flow and customers in the period prior to the fire. During the same period, there was a substantial increase in the financial burdens faced by the Hofbrau.

A detailed reconstruction of the Hofbrau's financial picture has been hindered by the unexplained failure to salvage corporate records from the Hofbrau's office, which sustained only water, not fire damage. Patricia Demyan, who handled the books, testified that she had retrieved only the Hofbrau's checkbook, though she conceded that she had the opportunity to recover other records. As a result, at least the date books, which contained the records of the catering done by the Hofbrau, as well as the checkbooks for an account at Chemical Bank which could have shed light on the course of the Hofbrau's finances, were not produced at trial.

There was evidence that the paintings located in the premises were retrieved by John Demyan and that the circular bar was dismantled and located nearby. No evidence was adduced concerning the disposition of the personalty that was not damaged by the fire or located in places in the four story, multiple room structure, other than where the fires had taken hold.

The evidence gave no clue as to what disposition was made of the undamaged personalty.

A closer look at the financial situation during the few years before and up to the fire gives every suggestion of an enterprise going out of business either voluntarily or involuntarily.

The Hofbrau had not operated satisfactorily or profitably for several years prior to the fire. As demonstrated by its tax returns, the Hofbrau sustained a taxable loss for the four fiscal years ending April 30, 1978. In fiscal year 1975, the business sustained a taxable loss of $1,069. This loss jumped to $12,816 in fiscal year 1976, was reduced to $5,123 in fiscal year 1977 and was further reduced to $3,371 in fiscal year 1978. In 1979, the principals ceased drawing the weekly salaries theretofore taken.

There is also evidence to suggest that plaintiff was permitting the Hofbrau's physical plant to deteriorate in order to save on costs of maintenance and repair. John Demyan testified, without any back-up data to support his statements satisfactorily, that he spent $65,000 in 1965 to remodel rooms, $70,000 in 1966, and $20,000 in 1970. At any event, since then, the only significant renovation during the next nine years that he noted was the addition of a new tile floor to the barroom for a cost of $7,500. Moreover, the Hofbrau's deductions for depreciation on its federal tax returns dropped sharply from $19,094 in fiscal year 1975 to $2,235 in fiscal year 1976, $2,104 in fiscal year 1977 and $2,118 in fiscal year 1978.

Clearly, Demyan's Hofbrau, Inc. was being squeezed by strong financial pressures which increas-

ed steadily until the fire served effectively to massively damage the corporation's major asset and bring on the decision for the entire cessation of the catering, restaurant and bar business; no effort was made to take the Hofbrau back into business after the fire damage occurred. In further detail (although possibly repetitive) the chronology looks somewhat as follows:

Summer 1977:

Following an electrical blackout, John Demyan applied for a $30,000 loan from the SBA, alleging financial difficulties as a result of a spoilage loss caused by an interruption in refrigeration. Demyan testified that at the time he made the loan application, the Hofbrau was "hard pressed" financially. The business had never had a large cash surplus, and the spoilage loss caused cash flow stringency.

The loan application was denied.

Ten months after the fire, John Demyan was indicted and convicted of filing fraudulent misstatements in connection with this SBA application; he had obtained blank specimen invoices from suppliers which were fraudulently filled in.

December 1977:

The Hofbrau fell behind on the $347 a month payments required by a loan obtained from the SBA in 1970 and 1971.

When an investigator appeared for the SBA, Demyan explained that he was in arrears because business had declined. This, he said, was due to two factors: 1) New Jersey had lowered its drinking age (thereby removing the necessity for teenagers from that state to travel to adjacent Staten Island to drink) and 2) the shipping com-

panies, whose executives often ate lunch at the Hofbrau, had moved from Staten Island. Because of this, the number of lunches the Hofbrau served daily had declined from 150 to 40. In a personal financial satement submitted at the same time, Demyan claimed that his assets exceeded his liabilities by $116,000, and that the value of the real estate he owned was the value of his home, $80,000.

January 1978:
John Demyan made another application for a loan from the SBA, this time for $14,400, which also was denied.

June 1978:
John Demyan borrowed $25,000 for the Hofbrau from the Gateway National Bank, to be paid back at the rate of $824 a month. The bank required that Demyan personally guarantee the loan.

October 1, 1978:
John Demyan's brother, Frank, died. Frank Demyan owned half of Demyan's Hofbrau, Inc. and Demyan's Realty, Inc. He had worked nights at the restaurant and Mr. Sgroi, the Hofbrau's accountant, suggested that Frank Demyan's death was one of the reasons why the Hofbrau's sales declined in 1979.
Soon after his brother died, John Demyan listed the Hofbrau for sale with a Staten Island real estate firm, but received no inquiries or bids therefor. Out of the proceeds of the insurance on his brother's life, John Demyan received $58,000 and gave his sister-in-law Patricia $25,000. The amount due to Frank Demyan's estate for his interests in the Hofbrau and the real estate could not be paid.

Third Quarter 1979:
As evidenced by the payroll tax returns, the Hofbrau's payroll slumped $1,300 to $8,850 for the third quarter, 1979.

December 1978:
The Hofbrau again falls into arrears on the 1970/71 SBA loan.

July—September 1979:
Patricia Demyan went off the payroll so far as the weekly drawing previously paid to her deceased husband. John Demyan did not draw any salary from the Hofbrau by check, though he had customarily drawn $230 a week. On August 27, 1979, he submitted a form to the SBA in which he stated that he took home $150 a week, presumably in cash.

August 1, 1979:
John Demyan made a payment of three years of back business taxes for the Hofbrau of nearly $26,750, using the recent proceeds he had obtained from the sale of a house he had inherited from his parents.

August 27, 1979:
John Demyan told an SBA official investigating the arrears on his 1970/71 loan that "business was bad and they were unable to make payments." In supplying the official with financial information, Demyan stated that his sales were "low", that they were not providing a profit, and that he had debts that were past due.

September 28, 1979:
John Demyan obtained a loan from the Borg-Warner Finance Co. to pay the fire insurance premium on the Hofbrau.

December 1979:
The Hofbrau was burglarized and $3,200 in cash was stolen.

December 28, 1979:
Notice was mailed to Demyan by Borg-Warner Finance Co. that he is in default on the loan for the insurance premium and that the insurance will be cancelled effective January 9, 1980 on the Hofbrau.

At the time of the fire, the Hofbrau owed more than $14,000 to utilities and suppliers. The State claimed that the Hofbrau additionally owed $42,767 in back sales taxes for the period October 1, 1975 to April 10, 1978. This figure, disputed at the time, was later compromised at $22,186 plus interest. Moreover, there were still some $8,000 outstanding on the loan obtained in 1978 from the Gateway Bank, as well as approximately $17,000 outstanding on the 1970/71 SBA loan, of which $4,511 was in arrears.

Against these burdens, the Hofbrau's commercial bank account, less outstanding checks, contained $4,552.96. That the business' cash flow situation was dire is evidenced by the fact that the Hofbrau's bank account had been overdrawn on more than three occasions in the ninety days previous to the fire, once for more than $2,400. On another occasion, in early November, a total of five checks were returned by the bank because the account was overdrawn. Indeed, as late as December 26 two checks were returned for insufficient funds. The Hofbrau's cash flow was not likely to improve, since, as its accountant testified, sales were running at a rate 8-9 percent below those of the year before.

The obligation under a 1965 buy-sell agreement between the brothers to pay off Frank Demyan's estate for the latter's half-share of the companies, gave rise to a substantial liability in 1978 and remained unpaid and unpayable at the time of the fire. There were insufficient liquid assets in the businesses and in John Demyan's possession with which to pay off the debt.

In December 1965 John and Frank Demyan had executed a buy-sell agreement which covered their relationships as co-owners of Demyan's Hofbrau, Inc. and Demyan's Realty, Inc. According to the agreement, each brother was to procure $85,000 of insurance on the other's life, with the premiums to be paid by the corporations. Clause 6(a) of the agreement provided that, at the time of either brother's death, the insurance proceeds were to be collected by the surviving brother and paid over to the deceased's legal representative in partial payment for his share of the companies. Clause 6(b) obligated the survivor to pay the difference between the amount realized from the insurance and the value of the half share owned by the estate.[2]

When Frank Demyan died in 1978, there was only $50,000 worth of insurance on his life remaining in force, plus accrued interest and dividends. However, out of the proceeds of approximately $58,000 John Demyan paid only $25,000 to Patricia Demyan, Frank's widow and executrix. He called this payment

2. The obligation was payable by monthly notes of $625 with 4% interest. On default in payment of any note all became immediately due.

a "gift" in his testimony. Sometime in 1981, John Demyan memorialized an agreement reached with Patricia Demyan that he owed her an additional $100,000 for the estate's share of the two corporations. Only $5,000 was paid on account of that debt. The widow has received $1,000 a month as "interest" on the debt from April 1981 until the present day.

Taking account of the fact that the buy-sell transaction may not have been a truly arm's length bargain, John Demyan's acknowledgment that he owed his sister-in-law a total of $125,000 over-all for Frank Demyan's 50% interests, in lieu of the 1965 buy-sell agreement, still suggests that 100% of the combined assets of Demyan's Hofbrau and Demyan's Realty were not worth more than $250,000 at the time of the fire, far less than the $450,000 of fire insurance placed in 1979 on the Hofbrau building and its contents, alone. Even if, as John Demyan testified, the $100,000 was intended to be "[p]ayment for a possible sale of one-half portion of the commercial property which is two buildings," so that the $100,000 did not properly represent the entire value of Frank Demyan's half-share of both corporations, a debt of that size due to Frank's widow presented an impossibility of payment when and as required by the agreement, was certain to be a massive drain on the Hofbrau's already tight cash flow.

Summary

The picture of Demyan's Hofbrau, Inc. presented by the evidence was that of a business beleaguered by serious financial difficulties for more than a few years and then hobbled by the death of one of its principals and confronted with massive accumulated business and sales tax liabilities asserted by the State. Nothing John Demyan tried to do to cut costs, including delay-

ing payment on the Hofbrau's debts, reducing expenditures for maintenance and upkeep, and defaulting on the SBA loan, was effective in turning the business around.

The Hofbrau's impaired and failing fortunes, combined with the fact that only the Demyans and their employees had access to the premises, the fact that someone having familiarity with the building and possession of the keys was responsible for the two or three separate and separated points of origin of the fire caused by flammable liquids and accelerants placed at the widely separated points in the building and the fact that only the Demyans and plaintiff were shown to have had any motive for arson to seek relief by way of collecting on the insurance, are sufficient circumstantially to warrant the inference and finding that the arson fire was attributable to the assured. The preponderance of the credible evidence weighs in favor of the defendant's defense that the fires, of non-accidental, incendiary origin were induced or caused by the assured, its principals, agents or servants or that they were implicated therein.

Accordingly, it is concluded that the defendant is not liable to the plaintiff herein and the complaint is dismissed, with costs.

The foregoing, together with the Court's interim findings made at the conclusion of the presentation of the evidence, shall constitute the findings of fact and conclusions of law required by Federal Rules of Civil Procedure, 52(a).

SO ORDERED.

July 15, 1982

Milton Pollack
U.S. District Judge

Office-Supreme Court, U.S.
FILED
SEP 1 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1935

IN THE

Supreme Court of the United States

October Term, 1982

DEMYAN'S HOFBRAU, INC.,

Petitioner,

vs.

INA UNDERWRITERS INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER PURSUANT TO §22.06 OF THE RULES OF THE COURT

BARRY D. LESSER*
Attorney for Petitioner
c/o WEG MYERS & JACOBSON, P.C.
116 John Street
New York, N.Y. 10038
(212) 227-4210

*Counsel of Record

FRANK A. WEG
WEG MYERS & JACOBSON, P.C.
New York, New York
Of Counsel, on the Brief

ADDITIONAL QUESTION PRESENTED*

1. Does the fact that a District Court Judge sitting without a jury in a diversity civil arson case found arson using a standard of a required degree of persuasion lesser than and contrary to that required under State law constitute a clearly erroneous ruling depriving the prejudiced party of due process and requiring a reversal?

*We believe that this question was covered within the parameters of the original questions presented. But so that there be no question, it is re-presented at this time.

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STATUTES

Rule 22.6 of the Rules of the Supreme Court of the United States 1

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

DEMYAN'S HOFBRAU, INC.,
Petitioner,

vs.

INA UNDERWRITERS INSURANCE CO.,
Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER PURSUANT TO §22.06 OF THE RULES OF THE COURT

PRELIMINARY STATEMENT

This brief is respectfully submitted to supplement the petition for certiorari of the petitioner herein. It is submitted in accordance with Rule 22.6 of the Rules of this Court prior to a determination on the petition and addresses a new case by the second highest appellate court in the State of New York that was not previously available but directly affects the matter before the Court.

ARGUMENT

POINT I

THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK HAS FOUND THAT THE DECISION OF THE DISTRICT COURT AS TO THE STANDARD OF EVIDENCE APPLIED ON THE QUESTION OF ARSON REFLECTED AN ERRONEOUS VIEW OF THE LAW OF THE STATE OF NEW YORK.

On August 15, 1983, the Appellate Division [Second Department] of the Supreme Court of the State of New York, in *Hutt v. Lumbermens Mutual Casualty Company* (N.Y. 1983) __ A.D.2d __, __ N.Y.S.2d __ (not yet reported in the New York Official Reports or in the New York Supplement), NEW YORK LAW JOURNAL, August 24, 1983, p. 1, col. 6, and continued at page 3, columns 1 and 2, found the law in New York to be that arson in a civil case must be proven by a measure of persuasion of clear and convincing evidence. Further, the Court stated that the inference of arson must be "strong and almost inevitable."

In the footnotes to its unanimous opinion, the Court states with reference to the cause presently before this Court:

> "To the extent that Demyan's Hofbrau v. INA Underwriters Ins. Co. (542 F. Supp. 1385) which relied on Johnson v. Agricultural Ins. Co. (25 Hun. 251) is to the contrary, we need simply say that it reflects an erroneous view of the law of this State and, therefore, we decline to follow it."

Interestingly, the Court also states in a footnote:

> "A caveat is indicated. While, as discussed, we believe that, under New York law, the clear and convincing evidence standard relates to the quality rather than the quantity of the evidence presented, we recognize that the United States Supreme Court, in certain areas, has held as a matter of due process, that the standard requires a more exacting measure of persuasion—less than that of beyond a reasonable doubt imposed in criminal causes but more than the traditional preponderance (e.g., Santofsky v. Kramer, 455 U.S. 745, 764). Our holding today should not be read as reducing a measure of persuasion which may be constitutionally mandated in such cases."

We respectfully submit that the courts below, having viewed the evidence as presented under the wrong view of the laws of New York as respects the burden of proof in arson cases, the plaintiff has been denied its rights to due process. Since especially under the clear and convincing evidence standard the findings of the court below are not supported by the weight of the evidence, such findings are clearly erroneous.

CONCLUSION

BASED ON THE FOREGOING AND THE ORIGINAL PETITION FOR A WRIT OF CERTIORARI, PETITIONER RESPECTFULLY PRAYS THAT THIS COURT GRANT A WRIT OF CERTIORARI TO CONSIDER THE IMPORTANT QUESTIONS PRESENTED AND TO RECTIFY AN OBVIOUS ERROR.

Respectfully submitted,

BARRY D. LESSER*
Attorney for Petitioner

*Counsel of record

FRANK A. WEG
WEG MYERS & JACOBSON, P.C.
New York, N.Y.
Of counsel, on the brief

APPENDIX 1
OPINION IN *HUTT v. LUMBERMANS MUTUAL CASUALTY CO.*

ALAN S. HUTT, et al., appellants, v. LUMBERMENS MUTUAL CASUALTY COMPANY, respondent, et al., defendant.

Decided August 15, 1983

Before *Titone, J.P.; Lazer, Gibbons* and *Thompson, JJ.*

Appeal from a judgment of the Supreme Court at Trial Term (*George F.X. McInerney, J.*), entered October 19, 1981 in Suffolk County, which is in favor of the defendant-insurer, upon a jury verdict in said defendant's favor.

Scher & Eliasberg, P.C., Great Neck, N.Y. (Robert A. Scher of counsel), for appellants.

Whitman & Ransom, New York, N.Y. (Patrick Lanigan of counsel; Robert S. Newman on the brief), for respondent.

Titone, J.P.—In an action to recover the proceeds of a fire insurance policy, the plaintiffs appeal from a judgment of the Supreme Court, Suffolk County, which dismissed the complaint following a jury verdict in favor of the defendant-insurer (hereinafter defendant).

The issue is whether the defendant met its burden of establishing the affirmative defense of arson. Finding that it did not, we reverse.

Plaintiffs were the owners of a one-family house, in Deer Park, L.I., in which they had resided for some twenty-one years. The house was insured under a standard homeowner's policy issued by defendant which provided protection against damage caused by fire. Sometime during the early morning hours of Feb. 21, 1980, while the plaintiffs were home, a fire destroyed the house and its contents. Defendant disclaimed coverage, claiming arson. This action followed.

To support its arson defense, defendant produced a single expert whose conclusion that the fire was incendiary in nature was based upon the premise that certain wall-burn patterns (described as "V patterns") were inconsistent with any hypothesis but arson, and that certain floor-burn patterns (called "pour patterns") suggested the use of an accelerant.

The expert's analysis of the wall-burn patterns hinged on the theory that no sparks had been carried from the point of the initial conflagration to ignite secondary fires throughout the house. This was based on the assumption that heat had broken the exterior den windows and vented the fire. But, on cross-examination, the expert conceded that he did not know when the windows had been broken and that it was equally possible that they might have been broken by the fire department after the fire had already engulfed the area. If that had been the case, it was possible that sparks, carried by smoke and flame, might have swept through the house causing secondary ignitions on the first and second floors, which would have been consistent with the manner and direction that the fire had spread.

Similar equivocation is involved with respect to the floor-burn patterns. The expert examined floor burns in the living room, bathroom and den and formed an initial opinion that they were produced by an accelerant. Yet, on cross-examination he qualified this opinion after noting that if an accelerant had been used the carpet would have burned through and had not, that innocuous chemicals may have been responsible for the bathroom pattern, and that an "instant-on" television (the type that plaintiffs owned) or burning debris that had fallen would also have been consistent with the downward burn patterns in the den. These possibilities were never considered during the course of the expert's investigation.

In an action to recover the proceeds of a fire insurance policy, it is the insurer's burden to establish the affirmative defense of arson (see 2 NY PJI 4:80, p. 1066). And, notwithstanding some early New York cases suggesting that the burden is met by a mere preponderance standard of proof (e.g., *Johnson v. Agricultural Ins. Co.*, 25 Hun 251),[1] we think that, because arson is "but one form of fraud in making [a] claim under a policy" (2 NY PJI 1066) and an inference of arson must be "strong and almost in-

(1) The rule set forth in Johnson was noted by the Court of Appeals to be the subject of much criticism and has never been directly passed upon by that court (Seybolt v. New York, Lake Erie & Western R.R. Co., 95 NY 562, 569). Moreover, it would appear that the Johnson court's real concern was with limiting the reasonable doubt standard to criminal cases (see Kurz v. Doerr, 180 NY 88, 92; compare, Groom, Proof of Crime in a Civil Proceeding, 13 Minn L Rev 556, with Cohen, Allegation of Crime in a Civil Action: Burden of Proof, 20 U Toronto Fac L Rev 20, 24). We would also note that, aside from a recent Federal District Court opinion (Demyan's Hofbrau v. INA Underwriters Ins. Co., 542 F Supp 1385, 1386), Johnson has not been cited by a New York State court for more than half a century.

evitable" (Appleman, Insurance Law and Practice, Section 12229), the more contemporary measure of persuasion is that of clear and convincing evidence (*Simcuski v. Saeli*, 44 NY 2d 442, 452; *Rudman v. Cowles Communications*, 30 NY 2d 1, 10; see, e.g., *Saks & Co. v. Continental Ins. Co.*, 26 AD 2d 540, affd 23 NY 2d 161; *C-Suzanne Beauty Salon v. General Ins. Co. of Amer.*, 574 F.2d 106, 112, n 9; cr. *Jonari Mgt. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 58 NY 2d 408, 417).

As was so well noted in *Ziegler v. Hustisford Farmers Mut. Co.* (238 Wisc 238, 298 NW 610, 612), " 'To fasten upon a man the act of wilfully and maliciously setting fire to his own building should certainly require more evidence than to establish the fact of payment of a note, or the truth of an account in setoff; because the improbability or presumption to be overcome in the one case is much stronger than it is in the other. Hence, it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required to establish trifling or indifferent ones' " (quoting 2 Jones, Commentaries on Evidence [2d ed], Section 563, p. 1036).[2]

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(2) We are cognizant that out-of-state authorities have divided on the question (see cases collected in Godwin v. Farmers Ins. Co. of Amer., 129 Ariz 416, 631 P 2d 571, 574; Great Amer. Ins. Co. v. K&W Log, Inc., 22 Wash App 468, 591 P 2d 457, 459; 46 CJS, Insurance, Section 1359, pp 567-568). We find those cases applying the clear and convincing standard (e.g., Carpenter v. Union Ins. Soc., 284 F. 2d 155, 162; Jonas v. Northeastern Mut. Fire Ins. Co., 44 Wisc 2d 347, 171 NW 2d 185, 187, n 1) to be more in accord with New York law which has long imposed a "far more demanding" burden when a serious accusation involving moral turpitude, such as fraud, is leveled (Jo Ann Homes at Bellmore v. Dworetz, 25 NY 2d 112, 121; see Commissioner of Public Welfare

It must be emphasized, however, that the clear and convincing standard relates only to the quality and note the quantum of proof (see Lilly, Introduction to the Law of Evidence, Section 15, p. 42; 4 Benders' NY Evid, Section 183.03). "Proof may be required to be clear and convincing without transcending the rule of preponderance" (*Roberage v. Booner*, 185 NY 265, 268).[3] Thus, in cases where the standard is applicable, the proper jury "instruct[ion] [is] that to make out a preponderance, the evidence should be clear and convincing" (*McKeon v. Van Slyck*, 223 NY 392, 397; see also, McBaine, Burden of Proof: Degrees of Belief, 32

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of City of N.Y. v. Ryan, 238 App Div 607; Ajax Hardware Mfg. Corp. v. Industrial Plants Corp., 569 F. 2d 181, 186; Maguire, Weinstein, and Mansfield, Cases and Materials on Evidence [6th ed], p. 1035; McCormick, Evidence [2d ed], Section 340, pp. 796-798). Moreover, the conflicting cases fail to recognize that, as we point out in the text, a clear and convincing standard relates to the quality rather than the quantum of proof (see, e.g., Godwin v. Farmers Ins. Co. of Amer., supra; Werner's Furniture v. Commercial Union Ins. Co., 39 Ill App 3d 59; Great Amer. Ins. Co. v. K&W Log, Inc., supra). To the extent that Demyan's Hofbrau v. INA Underwriters Ins. Co. (542 F. Supp. 1385), which relied on Johnson v. Agricultural Ins. Co. (25 Hun 251), is to the contrary, we need simply say that it reflects an erroneous view of the law of this State and, therefore, we decline to follow it.

(3) A caveat is indicated. While, as discussed, we believe that, under New York law, the clear and convincing evidence standard relates to the quality rather than the quantity of the evidence presented, we recognize that the United States Supreme Court, in certain areas, has held as a matter of due process, that the standard requires a more exacting measure of persuasion—less than that of beyond a reasonable doubt imposed in criminal causes but more than the traditional preponderance (e.g., Santosky v. Kramer, 455 US 745, 764). Our holding today should not be read as reducing a measure of persuasion which may be constitutionally mandated in such cases.

Calif L Rev 242, 246, 253-254).[4]

In this case, the evidence is equally balanced. Neither qualitatively nor quantitatively does it meet the required level of convincement. As a matter of logical necessity, the expert's opinion is based upon conjecture and speculation and cannot be deemed to preponderate in favor of defendant's hypothesized theory of arson (*Rinaldi & Sons v. Wells Fargo Alarm Serv.*, 39 NY 2d 191, 196; *Carrera v. State of New York*, 29 AD 2d 577, 578), particularly in the absence of proof of motive (cf. *Anderson v. General Acc. Fire & Life Assur. Corp.*, 58 AD 2d 568; *V.F.V. Constr. Co. v. Aetna Ins. Co.*, 56 AD 2d 598). Accordingly, the jury's verdict should have been set aside as against the weight of the evidence (see *O'Boyle v. Avis Rent-A-Car System*, 78 AD 2d 431, 439).

For these reasons, the judgment appealed from should be reversed, on the law and the facts, and a new trial granted.

All concur.

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(4) Trial Term did not give such an instruction. On re-trial, it should do so.

Office Supreme Court, U.S.
JUL 1
ALEXANDER L. STEVAS,

No. 82-1935

Supreme Court of the United States

October Term, 1982

DEMYAN'S HOFBRAU, Inc.,
Petitioner,

vs.

INA UNDERWRITERS INSURANCE CO.,
Respondent.

Brief for Respondent in Opposition to Petition for a Writ of *Certiorari*

Herbert P. Polk
Attorney for Respondent
c/o Whitman & Ransom
Attorneys at Law
522 Fifth Avenue
New York, NY 10036
(212) 575-5800

John Condon Young,
Of Counsel

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SUPREME COURT OF THE UNITED STATES

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Table of Authorities.

Federal Rules of Civil Procedure
28 U. S. Code

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury . . ., the court shall find the facts specially. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact . . . appear therein.

Rules of the Supreme Court

Rule 17 CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following . . . indicate the character of reasons that will be considered.

(a) When a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Rule 49 INTEREST AND DAMAGES

* * *

.2. When . . . [a] petition for writ of certiorari is frivolous, the Court may award . . . the respondent appropriate damages.

Statement of the Case.

The respondent ("INA")* submits this brief in opposition to the application by the Petitioner ("Demyan's") for a writ of *certiorari* to the Second Circuit which has both affirmed the judgment of the District Court (Milton Pollack, D. J.) and denied Demyan's both a rehearing and *en banc* consideration of its appeal.

*The respondent is a subsidiary of Cigna Corp., whose corporate affiliates are listed in the Appendix to this Brief.

The issues at the trial of this diversity action between a New York citizen-policyholder and a Pennsylvania citizen-fire insurer included the factual question whether Demyan's had set or procured the fire which damaged its restaurant on January 8, 1980. Judge Pollack heard the evidence on four trial days within a ten-day span and, as soon as both parties had rested,* ruled from the bench as to one of the constituent issues of that arson defense, *i.e.*, whether the evidence established that the fire was incendiary in origin. Judge Pollack ruled that it was.

His statement on that issue follows:

> It has been clearly proved by the defendant and not contradicted by any acceptable evidence worthy of belief, that the fire on January 8, 1980 was of incendiary, non-accidental origin. There were two and perhaps three points of origin of fire, separate and separated, which were caused in each location by a supplied flammable liquid or accelerant to the premises. There was no evidence which is credited by the court of any other cause for the outbreak of the fires. The location of the points of origin and the inverted cones and the pooling make it clear and convincing beyond peradventure of doubt that arson was the cause at each of the two and perhaps three separate and separated portions of the insured premises. 542 F. Supp. 1385f (S.D.N.Y. 1982).

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*Demyan's seems to criticize Judge Pollack for making his finding of incendiarism "(i)mmediately upon the conclusion of the trial . . .and without benefit of a trial transcript" (Petition, p. 4). Were the court's findings spread on the record on August 2, 1983, rather than on June 2, 1982, the District Judge could not be faulted for stating "findings of fact . . . orally and . . . in open court following the close of the evidence," to quote the change in the penultimate sentence of Rule 52(a), effective August 1, 1983.

In the first of its "Questions Presented" to the Court, urging error under Rule 52(a), Demyan's challenges the propriety of Judge Pollack's ruling when he did, argues that he should have spelled out in greater detail his evaluation of the witnesses and the weight he ascribed to the testimony of each, and attempts to make a "due process" claim which is said to have arisen from the perceived infirmity of Judge Pollack's ruling, a "due process" claim Demyan's never made to either the District or the Circuit Court. In the second of its Questions Demyan's seeks to raise to the dignity of an appealable issue the Circuit Court's phrasing of its reasons for affirming the judgment of dismissal. Both of these first two Questions seem to invoke the Court's *certiorari* jurisdiction under the "power of supervision" clauses found in the last third of Rule 17.1(a). Demyan's does not appear to invoke any other aspect of Rule 17 or to advance any other "special and important reasons" for the Court's exercising its discretion to issue the requested writ. The third of Demyan's Questions conjures up a second "due process" argument that neither is realistic now nor was when Demyan's first raised it on its motion in the Second Circuit for rehearing or *en banc* consideration.

As in the Circuit Court, so here, Demyan's in effect concedes that Judge Pollack correctly found that Demyan's had both opportunity and motive to have set its property afire.

Argument.

As to Demyan's first Question Presented:

In the second paragraph of its "Argument" Demyan's admits that

> "this is *not* the case where (a lower court's factual) determinations lack evidentiary support or are against the weight of the credible evidence" (Demyan's Petition for *certiorari,* p. 6; the emphasis is Demyan's).

It is clear, therefore, that Demyan's seeks merely to have the Court exercise its Rule 17.1(a) "power of supervision" to examine Judge Pollack's findings and classify them as deficient in form under Rule 52(a). Judge Pollack came to the right conclusion but Demyan's faults his writing style.

Judge Pollack need not have written out in fine detail his views as to each exhibit he received in evidence or each witness he saw and heard. Indeed, as Circuit Judge Medina wrote for the Court in the *Ruby* case which Demyan's has cited in its Petition:

> [W]here the testimonial evidence is conflicting and the trial judge saw and heard the witnesses as they gave their testimony, . . . a finding of fact by a District Judge in a non-jury case must stand if there is substantial evidence to support it; and it must be assumed that conflicting testimony was rejected and that documents or parts thereof depending on the veracity of the witnesses giving such conflicting testimony were found to be unreliable, even if the trial judge does not make an endless series of detailed statements to the effect that he does not credit the testimony or part of the testimony of each witness.

Ruby v. American Airlines, Inc., 329 F. 2d 11, 14 (2d Cir. 1964), *vacated on other grounds* 381 U. S. 277 (1965)

Certain facts, some omitted from, others incorrectly recited in Demyan's Petition, help to explain Judge Pollack's determination, and the Second Circuit's, and Demyan's admission that their determinations enjoy evidentiary support.

Unmentioned by Demyan's is Fireman Maiello, "the first of the firemen" to arrive at the scene (*id.*, p. 12a). Mr. Maiello preceded Batallion Chief Gallagher to the fire by several minutes and forced open several locked doors to give the other firefighters access to the flames within the building. One such was the door to the "utility room" (as John Demyan referred to it on the witness stand) which housed air-conditioning equipment. The record supports the inference that the first fire fought was at that "utility room" door. Its immediate extinguishment would amply explain Mr. Gallagher's failure to notice flames at that doorway as he followed his personnel into the building, when he eventually did so. Mr. Gallagher neither saw the flames there that night nor heard Mr. Maiello describe them at trial. Judge Pollack had the advantage of seeing and hearing Mr. Maiello, however; and his findings enjoy the support of Mr. Maiello's evidence.

Judge Pollack also saw and heard Fire Marshal Kopp describe what he saw, did, and concluded on his two visits to the fire scene, the first the very morning of the fire. He arrived while firefighting operations were still in progress—not, as Demyan's Petition reads and implies, merely "one day thereafter" (*id.*, p. 8). Mr. Kopp described in his testimony both the "pooling" of the flammable liquid and an "inverted cone" that he saw at the entrance to that "utility room," one of the "two and perhaps three points of origin of fire" which Judge Pollack found

Demyan's belated and spurious "due process" claim aside, it would be an exercise in futility for the Court to dignify the first of Demyan's Questions by issuing a writ whose most favorable result from Demyan's standpoint would be remand to the District Court so that Judge Pollack might give a more explicit statement of his reasons for finding that the fire was set—as Demyan's concedes the evidence entitled him to find.

As to Demyan's second Question Presented:

On his direct examination of Mr. Gallagher, Demyan's trial counsel (and attorney in this Court) received an answer which included the information that on entering the building Mr. Gallagher found "the visibility was almost zero." The question which elicited that answer is this:

> "Q. Was there any heavy smoke coming from below and in back of you?"

If the Court (or Judge Pollack) had that question unadorned, the context of the answer might be clouded. Without interruption, however, Demyan's counsel clarified his question for the witness, for the trier of fact, and for the reviewing courts:

> "Q. I am referring when I ask you that question, to the area immediately adjacent to the right of the entrance that you entered, an area that's been described during the course of this trial as exposure two."*

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*"Exposure two" is the New York City Fire Department's terminology for the left side of Demyan's building as viewed from Van Duzer Street which it faced.

His next two questions also dealt with smoke conditions "immediately adjacent to (that) . . . entrance," before Demyan's counsel inquired about conditions farther within the building, asking:

"Q. And how about up above?"

The "exposure two" entrance is precisely where Mr. Maiello indicated the first firefighting occurred, precisely where Mr. Kopp found "pooling" and an "inverted cone." At that entrance Mr. Gallagher found "the visibility was almost zero." The Second Circuit was perfectly correct, therefore, in commenting as it did "that visibility within the building was 'almost zero' " (*id.*, p. 5a). The trial record, which page 11 of its Petition correctly quotes, the emphasis aside, simply does not justify Demyan's labored argument that the Second Circuit erred by characterizing the evidence as it did in making that comment.

Although Demyan's "now contends," on page 15 of its Petition, that on cross-examination Mr. Gallagher gave an answer to a hypothetical question which lacked an evidentiary basis, Demyan's made no such contention in either its brief to the Second Circuit or its motion for reargument or *en banc* consideration.

As to Demyan's third Question Presented:

Demyan's concludes its Argument by reference to "an overriding constitutional issue of first impression." This "issue" first appeared in Demyan's motion asking the Second Circuit for a rehearing or *en banc* consideration.

Apart from any issue of waiver, there is simply nothing in the New York law of judgments or the New York law of evidence to lend the least support to the suggestions that Demyan's (or either of its principals on the day of the fire) faces any criminal penalty based on the judgment in this action or that that judgment would be admissible as part of the prosecution's *prima facie* case on the trial of some indictment. Equally untrue is Demyan's contention that the People of the State of New York would be estopped from prosecuting were Demyan's to prevail in this action.

There is, finally, no warrant for Demyan's suggesting that the judgment in this action might visit "a serious economic impact of a negative nature . . . (because) of the implications and aspersions extant within the business and social community in which this matter took place" (*id.*, p. 19). It is equally probable, perhaps more so, that that "community" would react adversely to John Demyan's 1981 conviction for attempting to defraud the U.S. Small Business Administration (*id.*, p. 17a).

Conclusion.

The Court should deny Demyan's petition for a writ of *certiorari*, declare it a frivolous application, and award INA appropriate damages pursuant to Rule 49.2.

Respectfully submitted,

HERBERT P. POLK
Attorney for Respondent

JOHN CONDON YOUNG,
Of Counsel

APPENDIX.

The Respondent's affiliated corporations are these:

Colina Ins Co Ltd
Bimeh Shargh Ins Co.—20% Interest
Investors Life Ins Co of N Amer
Ins Co. of N. Amer. (U.K.) Ltd
Comp De Seguros Cruz Azulsa

New Enterprise Associates L.P.
Bankard Club Inc
Compar Facilities, Inc (of Pa)
Compar Facilities, Inc (of Wash)
INA U.K. Holdings, Ltd.

INA International Corporation
Lime Street Properties, Ltd.
Logan Land Company, Inc.
I. N. A. Insurance Company Ltd
Bankers Standard Fire/Marine Co

Bankers Standrd Ins Co
Datamann Inc.
Educators Life Ins Co
Educators Marketing Serv Corp
Well-Care, Incorporated

Teachers Ins. Underwriters
Extra Cover Ins Agency, Inc.
Grp for Internat Study & Eval
INA Community Services, Inc.
INA Insurance Services, Inc.

INA International Insurance Co.
INA Internat. Ins Managers, Ltd
INA Life Ins Co. of Canada
INA Underwriting Agency Ltd
Ins. Co. of N. Amer. (Australia)

Ins Co of N Amer (Ireland) Ltd
Ins Co of N Amer (New Zealand)
Maritime-INA Gen. Ins. Co. Ltd.
J. D. Robb & Assoc Ins Brokerage
Societe Civile Immobiliere Tur

Indemnity Ins Co of North Amer
Public Employees Ins. Service
Stellate, Inc.—Prod Liab
INA Healthplan of California
Companhia Colina De Seguros

INA Health Plan of Arizona Inc.
INA Service Company
Gatx Insurance Co.
INA Construction Risk Inc INACO
INAMIC Ltd.

INA Re Exchange Investors Inc
INA Bond Facilities, Inc.
INA Loss Control Services, Inc.
INA Universal Corp
INA Internat. Investors, Ltd

Internat. Safety Academy, Inc.
INA Title
INA Title Ins Co
F. S. Agency Inc
INA Diversified Services Inc.

Internat. Surplus Adjusting Ser
INA Forsikrings Aktieselskab
Extra Cover, Inc
INA Health Plan, Inc.
Surplus Ins Brokers of N. Amer

INA Healthplan of Texas, Inc
MJ Brock-Sons/Orange Cnty Resd
Compagnie D'Assurance Colina Sa
Contabilidad Mecanizada Sa
Educators Fund Mgt Corp

INA Montgomery Properties Inc.
INA Conference Facilities Inc.
INA Trading Corp.
INAPRO, Inc.
Insurance Company of Africa

La Nouvelle, S.A.
L. S. Holding Company
Petroleum Insurance Inc.
Philadelphia Investment Corp.
The 1792 Company

Ross Loos Medical Group
INA Standard
Standard Associates
INA Healthplan of Tuscan, Inc.
INA Healthplan of Washington

INA Health Plan of Florida
Lewis & Norwood Inc.
Illinois Union Ins Co
Master Life Insurance Company
Reinsurance Consultants Ltd

Cigna Corp Services Div
Cigna Organizational Dev Div
Cigna Financial Div
Cigna Human Resources Div
Cigna Legal Div

Cigna Staff (Per, Fin, Legal)
Cigna Outside Money Mgmt
C. G. Investment Mgmt Co
Cigna Corporate Accounts
Cigna Private Securities

Cigna Realty Advisor Inc
CONGEN Properties Inc
Cigna Special Investments
Cigna Howard Research & Div Inc
Cigna Affiliated Bus Grp Stf

Cigna International Dev
Arizona Health Plan Inc
Aetna Insurance Company
Cravens, Dargen & Co
Cigna C. G. Grp Ins Div

Cigna Grp Pension & Reins Div
C. G. Pension Services Inc
Cigna Individual Fin Svcs Div
Cigna Mgmt Resources Inc
Cigna Securities Inc.

Cigna Empl. Ben & Fin Svcs Grp Stf
Conn Gen Life Ins Co
Connecticut General Corp
Conn Gen Life & Cas Ins Co
Conn Gen Fire & Cas Ins Co

Aetna Fire Underwriters Ins Co
Aetna Ins Co of the Midwest
Aetna Reinsurance Company
American Lloyds Insurance Co
Atalfa Inc

AFIA Finance Corporation
C.G. Medical Programs Inc
Centry Indemnity Company
Terra Nova Ins Co Ltd
Technical Risk Mgmt Serv Inc

Rain & Hail Ins Service Inc
Assoc. & Consumer Mktg Svcs Corp
Atlantic Employers Ins Co
EFMC Services Corp
INA Commercial Finance

INA Community Serv of Ohio
INA Employers Ins Co
INA Properties of Delaware, Inc
INA Properties Processing Ctr Inc
INA Sudamericana S.A.

Ins Co of N Amer (Greece)
Int'l Survey & Adjustment Co Ltd
Inversiones INA Ltd
La Henin Vie
Latina Holdings Ltd

Lincoln Union Syndicate Inc
Montgomery & Collins Int'l
Railroad Ins Brokers Inc
Reaseguros Inacap S.A.
Senior Mktg Ins Serv Corp

All Funds Management Corp
C. G. Trust Company
Conn Gen Mgmt Resources Inc
Conn Gen Pension Svcs Inc
INA Benefit Serv Co

INA Standard Inc
C. G. Equity Ventures Inc
Congen Realty Advisory Co
Parkway Mangement Corp
Philadelphia Drilling Company

Philadelphia Eagle Drilling Co
Philadelphia Falcon Drilling Co
Philadelphia Jefferson Corp
Realconn, Inc
Reston Office—1 Inc.

Scottsdale Exec Centre Corp
2525 E Arizona Biltmore Circle
Blyth Eastman Dillon Cptl Mkts
Eastman & Dillon Int'l Holdings
Bundoora Private Hosp Pty Ltd

INA Health Care Group Inc
INA Eagle Lodge Properties Inc
Cigna Associates, Inc
Insurance Co. of North America
Allied Ins Company

INA of Texas
Pacific Employers Insurance Co.
Life Ins. Co. of North America
INA Life Ins. Co. of New York
Compagnie Financiere INA

Compagnie Nouvelle D'Assurance
Continental Ass Co London Ltd
INA International Holdings Ltd
INA International Ins Co. Ltd.
INA Overseas Properties Ltd

Hai, Inc.
INA Corporation
INA Security Corporation
Gamma Inac, Inc.
Inax Underwriters Agency Inc.

Inax Inc
INA Capital Management Corp.
Horace Mann Educators Corp
Horace Mann Insurance Co
Horace Mann Life Ins Co

Horace Mann Investors, Inc
MJ Brock—Sons/L. A. Residentl
Teachers Insurance Company
Agri Ins Underwriter Inc
MJ Brock—Sons/Sacamento Resd

MJ Brock & Sons-San Fran Resd
Public Employees Insurance Co
MJ Brock—Sons/Colorado Resd
MJ Brock—Sons/Charter Oaks
Hosp Affilities, Internat Inc

INA Capital Advisors, Inc.
INA Coast to Coast Corp
Coast to Coast Corp
Seguros Colina, S.A.
Alic Inc

Allied Insurance Co.
INA County Mutual Insurance Co
JTX Club
Membership Assistance Corp
Insuror Management Company

INA Farm Center, Inc.
The Data Corporation
INA Financial Corporation
INA Insurance Co of Canada
Recovery Serv. International

California Union Ins Co
INA Underwriters Ins. Co.
Montgomery & Collins Inc
Montgomery & Collins—Pennsylvania
Montgomery & Collins—Texas

Montgomery & Collins—Thailand
Montgomery & Collins—Dallas
Montgomery & Collins—Florida
Montgomery & Collins—Illinois
Montgomery & Collins—New Jersey

Montgomery & Collins—Massachusetts
INA Properties, Inc
Richgart Inc
R & I Joint Venture
Commercial Surplus Fac Inc

INA Properties of Colorado Inc
INA Reinsurance Company, S.A.
Eagle Lodge
INA Foundation
INA Reinsurance Co. (U.K.) Ltd

INA Special Risk Facilities Inc
Lawrence Systems, Inc
Lawrence Warehouse Company
Lawrence Business Credit Inc
Lawrence Collateral Svcs Ltd

Lawrence Financial, Inc
Lawrence Int'l Holding B.V.
Lawrence Systems, Inc of Mass
Inacan Holdings Ltd.
Alaska Pacific Assurance Co

INACAP, S.A.
INACAP Reasegurds, S.A.
INAMAR, Ltd.
Stellate (Star Sprinkler)
INAMEX S.A.

INAVEN C.A.
Mealane Corp—Prod Liab
Mealane Corp of California
Safety First Products Canada, Ltd
Inter Trust Insurance Company

Interamerican Life Ins Co S.A.
International Service Corp.
Internat. Rehabilitation Assoc.
Int'l Rehab Asso Pty Ltd
Marketdyne International, Inc

Marketdyne of Canada Ltd
INA Insurance Co. of Illinois
INA Life Insurance Company
INA Reinsurance Company
ESIS, Inc.

Robert F Coleman Inc.
Diversified Ins Agency Inc
National Employee Benefit Corp
National Health Care Corp.
Air Balance Inc

Self-Insurers Management Corp
E. J. McConnell & Assoc., Ltd.
MJ Brock & Sons
Northern Woods Products Assoc.
Norton Life Insurance Company

Pan Arabian Insurance Co., Ltd.
INA Insurance Company of Ohio
Premium Recovery Serv Internat.
Project Finance Corporation
INAC Corp.

INAC Corp of California
MJ Brock-Sons/General Contract